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Book Reviews

Making We the People: Democratic Constitutional Founding in Postwar Japan and South Korea
by Chaihark HAHM and Sung Ho KIM
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In *Making We the People: Democratic Constitutional Founding in Postwar Japan and South Korea*, the authors address a theoretically provocative topic on Japanese and Korean constitutional history. The book is incredibly well researched and is thoroughly meticulous, even when the authors describe esoteric questions regarding Japanese constitutional history, for example, the August Revolution Thesis, which purports to explain the legitimacy of the current Constitution of Japan.

The authors set their starting hypotheses in their Introduction. The first is the assumption that "any external constraint on or interference with the process of constitution-making is illegitimate" (p. 4). The second is that "the constitution must establish an entirely new civic order and identity" (p. 4). The third and final hypothesis is that "there exists a constitutional subjectivity which can exercise such autonomy from others and enact such a radical break from the past" (p. 5).

For the sake of fairness, I would like to add that the authors' conclusions are significantly more nuanced than these simplistic assumptions, which they tentatively propose in order merely to deconstruct them at the end. As conclusions, the authors point out that in forming a constitution, people should always negotiate with external others; people deeply negotiate with the past; and the identity of a people has no clear boundary, never being stable and being constantly mutable. I almost completely agree with these conclusions.

However, I doubt to what extent the first and third assumptions apply to Japan. As the authors suggest, right-wing leaders, like Shinzo Abe, assert that since the current constitution was imposed by the American occupying forces, it lacks legitimacy and, therefore, the Japanese people should revise it comprehensively, making a clear break from it (p. 4). However, I am not sure to what extent we should take such right-wing rhetoric seriously, because the implication is that Japan should get rid of constitutionalism itself. The democratic process of amending the current constitution, Article 96, is just a means to that end. These right-wing leaders deny the idea that political power should be constrained by a constitution.[1]

According to the basic philosophy of right-wing leaders, the idea that political power should be constrained by a constitution is foreign to Japanese tradition; it is seen as constitutionalism being imposed on Japan. Prime Minister Abe maintains that such an idea is obsolete, though once prevalent in the age of absolutism in Europe, and it is not relevant in this age of democracy, where political power is legitimatized by the expressed will of the people. This, however, has not prevented Prime Minister Abe from disregarding the expressed will of the people on occasion. For example, when his government suffered a serious defeat in the upper house election in 2007, he said that since upper house elections do not decide whether the electorate places confidence in the government, he would not resign.[2]

1. Mr Abe has repeatedly asserted this negative understanding of constitutionalism. See, for example, his remark at the budget committee of the Lower House on 20 February 2014; "186 Session of the Diet Budget Committee No. 12" *The House of Representatives* (20 February 2014), online: The House of Representatives <http://www.shugiin.go.jp/internet/itdb_kaigiroku.nsf/html/kaigiroku/001818620140220012.htm>, as well as his remark quoted in Meiji KAKIZAKI, *The Inspection of Abeism* (検証安倍イズム) (Iwanami Shoten, 2015) at 165.

2. Eventually he resigned in September of the same year. Cf "Why now, Liberal Democratic Party Puzzled by Prime Minister Abe's Resignation Announcement" *Asahi* (9 May 2012), online: Asahi <http://www.asahi.com/special/070912/TKY200709120307.html>.

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On the other hand, as to the upper house election in 2016, he asserted that this election would decide whether the electorate places confidence in the policies of the current government.[3] Moreover, before the 2016 upper house election, he persistently declined to publicly discuss his plan to amend the constitution, but after the election resulted in a two-thirds majority supporting the amendment, he boasted that the electorate gave the Diet a mandate to proceed with the amendment.[4] In truth, election results are an object of manipulation, not a sovereign order to be obeyed.

Such a way of thinking can be traced back to the *Kokugaku* (国学), the school of ancient Japanese thought and culture, which rose in the *Tokugawa* era. Moto'ori Norinaga (本居宣長: 1730-1801), a prominent scholar in the *Kokugaku* tradition, argues that Chinese thinkers have propagated noble-looking ideas, such as justice (義), virtue (徳), benevolence (仁), or civility (礼), because the Chinese people are intrinsically wicked and sly who would fight each other incessantly without the constraint of such artificial norms. Evidence of this is in the frequency in which they have violently changed their dynasties. The meanest rascal of low birth can, if fortunate, suddenly become an emperor in China. Ancient Chinese sages (聖人) are revered, merely because they successfully invented artificial ideas as tactical means to rule wicked people.

On the other hand, Norinaga held that the Japanese people have lived peacefully and obediently without such artificial, alien ideas or *karagokoro* (漢意). In his view, the descendants of the Sun God have continuously reigned over Japan, where people are intrinsically good and obedient, as if all the citizens were children of the emperor.[5] People lived in accordance with their genuine, honest feelings, among which the deepest and strongest is that of love between men and women.[6]

We can detect a similar sense of ancestral superiority in contemporary right-wing advocacy. Fundamental rights, constitutionalism, and sustaining plural values are alien to the Japanese tradition. Without such artificial ideas, people in Japan have prospered in their own way. Accordingly, the basic tenet of this line of thought is that people should rid of themselves of these artificial ideas and purify themselves. Particularly in speeches abroad, Prime Minister Abe has stressed that Japan shares the universal ideas of human rights, rule of law, and democracy. However, the reality of his policy and his domestic speeches do not reflect these ideas.

As to the authors' third starting assumption that "there exists a constitutional subjectivity which can exercise such autonomy from others and enact such a radical break from the past" (p. 5), it seems that as a matter of fact, the populace in Japan does not share this assumption.

First, the concept that constitutional subjectivity—in other words, constituent power—exists before the enactment of the constitution is tainted with several logical difficulties.[7] Can a multitude of people organize themselves and coherently decide their will without any institutional framework? Who will provide this legal framework at the outset? Is it the constituent people? If so, there is infinite regress.

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3. Liberal Democratic Party of Japan, "President Abe's Press Conference in Response to the Results of the 24th House of Councillors Election" (11 July 2016), online: Liberal Democratic Party of Japan <https://www.jimin.jp/news/press/president/132688.html>.

4. See "Liberal Democratic Party Prime Minister Shinzo Abe Press Conference" *Independent Web Journal (IWJ)* (11 July 2016), online: IWJ <http://iwj.co.jp/wj/open/archives/316088>.

5. See Moto'ori NORINAGA, "Tamakushige (玉くしげ) [The Beautiful Comb-Box]" (originally published in 1789, published by Iwanami Shoten in 1934), at 35-36 and Moto'ori NORINAGA, "Naobinomitama (直毘霊) [The Spirit of Re-purification]" (originally published in 1825, published by Iwanami Shoten in 1936), at 17-21.

6. According to Moto'ori Norinaga, wanting to eat good food, wear good clothes, dwell in a comfortable house, and be respected are genuine and honest human feelings. Those who claim they do not value beautiful women are merely lying, covering up their true human emotions. Japanese people, including the emperor, have expressed such honest love towards beautiful women by composing short sonnets (和歌). See Moto'ori NORINAGA, "Tamakatsuma (玉勝間) [The Beautiful Bamboo Basket]" (originally published in 1795-1812, published by Iwanami Shoten in 1934), vol 4 at 176 and Moto'ori NORINAGA, "Isonokami-sasamegoto (石上私淑言) [Private Talks on the Ancient]" (originally published in 1816, published by Iwanami Shoten in 2003), vol 2 at 273-274.

7. See Yasuo HASEBE, "On the Dispensability of the Concept of Constituent Power" (2009) 3 Indian Journal of Constitutional Law 39 [Hasebe, "On the Dispensability"]. The authors engage with a similar paradox on pp. 46-64.

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Even if such an entity of organized people exists, can such a sovereign subject coherently constrain itself by making a constitution? As an ancient theological paradox indicates, if the entity cannot bind itself, it is not sovereign at the outset, but once the entity has successfully bound itself, it is no longer sovereign. The logic of voluntary self-binding on the part of the sovereign is inherently contaminated with self-reference. The authors themselves engage with these paradoxes, and their conclusion is that "we believe that the constituent people come into being as they are doing the constitution-making" (p. 64).

I admire the authors' intellectual endeavour, but my impression is that this conclusion is a poetic expression rather than an academic explanation. Incoherent ideas remain unresolved. The authors do not solve the paradox of the sovereign's self-binding. They may say that when a people act as a people, it is organizing itself into a unified (constituted) self, which is in so doing binding itself. However, this argument presupposes the existence of a people as an agent. The authors seem to fail to explain how "the people" comes into being.

Here the authors refer to Christine Korsgaard's thesis on self-constitution (pp. 53-55). While her thesis is understandable as an individual's self-constitution through his choices between given alternatives, many readers would be perplexed as to how this thesis is applicable to a group of persons. If the group is already an agent, it can self-constitute itself in this way. However, there is a problem with how a group can become an agent before it is equipped with a constitution.[8] On this point, by referring to Stephen Holmes, the authors admit that there must be some institutional framework before discussing group agency (p. 55). However, in this admission, the authors' view approaches that of Hans Kelsen, whose theory they repudiate (pp. 51-53).

I do not deny that some philosophers provide theories on group subjectivity without recourse to pre-existing institutional frameworks. Prominent examples are John Searle and Maurice Hauriou.[9] However, the populace of Japan does not seem to be equipped with any acute sense of constitutional subjectivity. The reason for this is that who forms a constitution is irrelevant to its legitimacy to a large extent.

It may be asserted that, even if the idea of such an entity is theoretically incoherent, people still need a narrative of constitutional identity to accept their constitution. I do not share this idea. There may be countries where people embrace such narratives. Perhaps, Americans and Koreans embrace them. However, the Japanese people do not seem to wish for such a narrative. According to a recent poll conducted by NHK,[10] just 26% of the people questioned reported that the Constitution should be revised. Given that it is well known that the current Constitution was imposed upon the Japanese government, we may conclude that the Japanese people do not think that this fact necessitates its revision.

Some may object that in order to establish a new constitution, we should presuppose the existence of a constituent people. The authors point out that, in December 1945, the Japanese government revised the election laws for the Diet and drastically contracted the boundaries of the electorate,

8. It should be noted that Korsgaard calls her model of self-constitution the "constitutional model", according to which a person's self should be regarded as being above other aspects of a person, such as passion and reason (Christine KORSGAARD, *Self-Constitution: Agency, Identity, and Integrity* (New York: Oxford University Press, 2009), Chapter 7). The self should be compared to the constitution of a city-state as described in Plato's *Republic*. The person is not identified with his reason alone. He identifies with his constitution, and his constitution says that reason should rule. In her argument, the city is supposed to be already constructed as an "agent that performs actions and so has a life and a history" (*Ibid* at 141). The city as such, deprived of its constitution and not unified by it, cannot act (*Ibid* at 152). Therefore, while in a possible sense there is no state prior to the people's choices and actions because it is in a continuing process of self-constitution, this process itself presupposes an existence of a constitution of the state.

9. See John SEARLE, *The Construction of Social Reality* (New York: Free Press, 1995) and Maurice HAURIOU, *Précis de droit constitutionnel* [Précis of Constitutional Law], 2nd ed. (Paris: Sirey, 1929) respectively.

10. NHK News at 7 o'clock, Broadcast on 20 June 2016. The number is decreasing. In 2007, 41 percent responded that the constitution should be revised at some point.

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disenfranchising former colonial subjects before the general election which decided who would participate in the deliberation of the new constitution (p. 272). This seems to indicate that there was already a presupposed conception of who should be the members of "We, the Japanese people".

However, this contraction of the electorate was merely a logical corollary of the Potsdam declaration, which restricted the range of Japan's power to its main islands. By the same token, when the preamble of the draft constitution, written by the occupying forces, referred to "We, the Japanese people", we cannot presume that this "We, the People" included former colonial subjects. Including them would have implied that former colonial subjects were still under the sovereignty of Japan. That was the reason that the occupying authorities did not resist the elimination of ex-colonial subjects from the electorate. It should be added that this contraction was not made by the sovereign people of Japan, but by the government as an organ of the State, which was necessitated to do so under the occupation by the Allied Forces.[11]

I admit that excluding former colonial subjects residing on the main islands of Japan is not a logical necessity resulting from the Potsdam declaration.[12] However, deciding to include them would have brought about political and legal problems with neighbouring countries. Not doing so was a practical choice, given that the Nationality Act of Japan had adopted the principle of lineage, not that of *jus soli*. The question was which boundaries of the electorate would work as governmental tools, rather than what conception of "We" should be constructed.

Likewise, as the authors correctly indicate, Miyazawa's August Revolution Thesis does not claim that the sovereign people began to act as a unit in August 1945 (p. 147). The thesis is rather a tentative explanation of the apparent discrepancy between Emperor Hirohito's preceding edict that the Constitution is a result of the revision of the former *Meiji* Constitution, and the preamble's declaration that "We, the People" established this Constitution. This thesis clearly reveals the fictionality of the claim that the sovereign people established the Constitution, just as the claim that the Glorious Revolution was brought about by the initiative of the British people is fiction.[13]

After all, as the authors persuasively argue, prior to the constitutional founding, "it may be difficult, if not impossible, to determine in the abstract which individuals are to be included within the political bounds of constitutional peoplehood" (p. 197). This point is corroborated by Korea's experience after the war. How the "union of one hundred-million hearts", as the Japanese wartime propaganda alleged, was to be dismembered and further divided between two peoplehoods of North and South – largely a product of the tumultuous geopolitics of the day – is meticulously described in the book (pp. 246-74).

One of the most fascinating stories described in the book is that of Korea's aspiration for levelling the constitutional ground and making a clean break from the past. When the National Assembly adopted the constitution in 1948, its self-understanding was that it was engaged in the establishment of a brand new state, because Korea was a "no man's land" after the surrender of Japan. Besides, the drafters of the constitution thought that a "Great Revolution" took place on 1st March 1919 when millions of Koreans rose up in a nationwide protest against Japanese colonial rule and that the new Republic of Korea was first established on this date (pp. 166-68). This recourse to a largely notional "alternative history" may be an illustrative example of aspiration for a constitutional narrative, which the Japanese people do not embrace for their constitution.

The authors' argument persuasively suggests that "We, the People" is not an autonomous, pre-cultural island,[14] but situated and constructed in a networked system, evolving dynamically. After all, their analogical reference to Christine Korsgaard's thesis on self-constitution is not far from the truth.

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11. *Treaty of Peace with Japan*, 8 September 1951, 136 UNTS 46 (entered into force 28 April 1952), which ended the Second World War, did not mention the changes of nationality of former colonial subjects.
12. The authors deal with this question on pp 239-44.
13. See Jonathan ISRAEL, ed, *The Anglo-Dutch Moment: Essays on the Glorious Revolution and its World Impact* (Cambridge: Cambridge University Press, 1991). I do not deny that Protestant people in Britain welcomed the Dutch invasion. Similarly, the Japanese people enthusiastically welcomed the enactment of the Constitution of Japan in 1946.
14. Cf Julie E COHEN, "What Privacy is For" (2013) 126 Harvard Law Review 1904 at 1906.

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However, this observation brings us to the question of the goal of searching for the sovereign, "We, the People".

Russel Hardin points out that, because the basic function of a constitution is to co-ordinate interactions in society, what is essential is not the agreement of the people, but their acquiescence to the constitution.[15] Joseph Raz argues that constitutions are inherently self-validating: "They are valid just because they are there, enshrined in the practice of their countries".[16] According to Raz, a constitution is legitimate, as long as it is effectively working as a constitution and remains within the boundaries set by moral principles. It does not derive its authority from the authority of its authors. If Hardin and Raz are correct, then the concept of constituent power is dispensable. How a constitution was formed, or in whose name, is not relevant to the legitimacy of that constitution.[17] The questions to be asked are: is the constitution working, and is it within the boundaries set by moral principles?[18]

I suspect that the authors' focus on the self-constitution of "We, the People" derives from their sincere commitment to democratic ideals. However, one of the moral and democratic principles addressed is that the government should be accountable to the people's interests and aspirations. The definition of "democratic" does not necessitate taking "We, the People" so seriously.

Another moral is that if co-ordination of social interactions is the ultimate purpose of constitutionalism, a sovereign nation-state with an image of solid constitutional subjectivity is not necessarily the best instrument. A supra-national organization, such as a federation like the Bismarckian Empire or a foreign contractor trusted with government jobs, may perform that function better. We should not take sovereignty too seriously, either.[19]

Though this book is impeccably well-researched, one aspect of their description of Article 9 of the Constitution of Japan should be nuanced further. While the authors emphasized that during the constituent Diet, both the Prime Minister, Shigeru Yoshida, and the Minister in charge of constitutional affairs, Tokujiro Kanamori, stated that Japan renounced any war, including self-defensive war (p. 85), it should be pointed out that these two ministers did not express that Japan renounced the right to self-defence, in particular, that of individual self-defence. On the contrary, during the constituent Diet, Kanamori said, "while Article 9 prohibits the government from maintaining war potential, there may be other ways to defend ourselves".[20] He suggested that when Japan joined the United Nations, Japan should and could find a way to reconcile Article 9 and the UN Charter.[21]

Simultaneously with the promulgation of the Constitution of Japan in November 1946, the government issued a booklet entitled *An Introduction to the New Constitution* (新憲法の解説), which was authored by members of the Cabinet Legislation Bureau and with forewords written by Yoshida

15. Russell HARDIN, *Liberalism, Constitutionalism, and Democracy* (Oxford: Oxford University Press, 1999) at 85-90. Hardin says, "If a constitution is to be stable, it must be self-enforcing. It must be a co-ordination, because the nation cannot go to a supranational agency to enforce its citizens' contractual agreement with each other or with their government" (*Ibid* at 98).

16. Joseph RAZ, "On the Authority and Interpretation of Constitutions: Some Preliminaries" in Larry ALEXANDER, ed, *Constitutionalism: Philosophical Foundations* (Cambridge: Cambridge University Press, 1998) 152 at 173.

17. As the authors mention (pp. 66-67), even Jean-Jacques Rousseau, a champion of democracy, discusses the image of a *législateur*, who makes the people accept a constitution with recourse to religious enchantment. See Jean-Jacques ROUSSEAU, *The Social Contract and later political writings*, ed and translated by Victor GOUREVITCH (Cambridge: Cambridge University Press, 1997), Book II, Chapter VII at 68-72.

18. See Hasebe, "On the Dispensability", *supra* note 7 at 48-9. Perhaps, we can state the same point in a Korsgaardian way. If there is a working constitution, then we can say that there is a people acting as an agent, because only after being equipped with a constitution, the people can perform actions and has a life and a history. Such a people will self-constitute itself in choosing what it should and will be. And the people are bound because they have a constitution; not because it binds itself, which is a contradiction.

19. See Yasuo HASEBE, "Why We Should Not Take Sovereignty Too Seriously" in Antero JYRÄNKI, ed, *National Constitutions in the Era of Integration* (The Hague, London, Boston: Kluwer International, 1999) at 113.

20. Shin Shimizu, ed, *The Records of the 90th Imperial Diet on the Constitution of Japan* (日本国憲法審議録) (Hara Shobo, 1976), vol. 2, p. 72.

21. *Ibid* at 96-97.

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and Kanamori, and in which the government explained how to reconcile Article 9 and the UN Charter. According to the booklet, at the 1946 constituent Parliament, many raised the concern that Japan would be unable to repel attacks from abroad under Article 9. The booklet states that there is no reason to worry over this issue, because Japan will join the United Nations soon after becoming independent, and the UN Charter clearly recognizes the right to self-defence for its member states.

This implies that the government at the time of the promulgation of the Constitution regarded the right of individual self-defence as permissible as a way of repelling foreign attack under Article 9. If so, we can doubt whether there was any fundamental turnaround on the part of the government when the Self-Defence Forces were established in 1954.

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Comparative Executive Clemency: The Constitutional Pardon Power and the Prerogative of Mercy in Global Perspective
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In 1977, Israeli academic Leslie Sebba published two articles comparing constitutional arrangements for executive clemency the world over.[1] Despite some thematic coverage in comparative constitutional law or death penalty textbooks[2] and in several smaller-scale comparative studies,[3] Sebba's work remained the leading scholarship on executive clemency across national borders for almost 40 years. There are good reasons for the scarcity of academic literature on executive clemency – broadly defined as the executive branch reducing or abrogating lawfully-imposed punishment, without fully exonerating the prisoner (p. 159) particularly in a comparative context. Clemency deliberations by executive decision-makers throughout the world are usually performed in secret, with public justification for the exercise of clemency rarely given. Accordingly, possible reasons behind death sentence commutations are rarely analyzed in any systematic way. However, this does not make such research any less urgent. As Kobil observes, clemency and pardons now demand academic explanation to an even greater degree: "[L]ike the monarchical power from which it derives, clemency is shrouded in mystery and often fraught with arbitrariness at a time when other aspects of [criminal justice systems] are becoming more open and fair."[4]

1. Leslie SEBBA, "Clemency in Perspective" in Simha F LANDAU and Leslie SEBBA, eds, *Criminology in Perspective: Essays in Honour of Israel Drapkin* (Lexington, Mass: Lexington Books, 1977); Leslie SEBBA, "The Pardoning Power: A World Survey" (1977) 68(1) The Journal of Criminal Law and Criminology 83.
2. See e.g. Wen-Chen CHANG et al, *Constitutionalism in Asia: Cases and Materials* (Oxford and Portland, Oregon: Hart Publishing, 2014), 129-136; Roger HOOD and Carolyn HOYLE, *The Death Penalty: A Worldwide Perspective*, 5th ed (Oxford: Oxford University Press, 2015) 312-321.
3. See e.g. Ariane M SCHREIBER, "States That Kill: Discretion and the Death Penalty – A Worldwide Perspective" (1996) 29 Cornell International Law Journal 263; Rob TURRELL, "It's a Mystery: The Royal Prerogative of Mercy in England, Canada and South Africa" (2000) 4(1) Crime, History & Societies 83; Daniel PASCOE, "Clemency in Southeast Asian Death Penalty Cases" (2014) Centre for Indonesian Law, Islam and Society Policy Papers 1.
4. Daniel KOBIL, "Due Process in Death Penalty Commutations: Life, Liberty, and the Pursuit of Clemency" (1992-1993) 27 University of Richmond Law Review 201 at 202.

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